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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

SIX4THREE, LLC, a Delaware limited liability  
company,

Plaintiff,

v.

FACEBOOK, INC., a Delaware corporation;  
MARK ZUCKERBERG, an individual;  
CHRISTOPHER COX, an individual;  
JAVIER OLIVAN, an individual;  
SAMUEL LESSIN, an individual;  
MICHAEL VERNAL, an individual;  
ILYA SUKHAR, an individual; and  
DOES 1-50, inclusive,

Defendants.

Case No. CIV 533328

**Assigned for all purposes to Hon. V. Raymond  
Swope, Dept. 23**

**FACEBOOK, INC., MARK ZUCKERBERG,  
CHRISTOPHER COX, JAVIER OLIVAN,  
SAMUEL LESSIN, MICHAEL VERNAL, AND  
ILYA SUKHAR'S CASE MANAGEMENT  
STATEMENT**

Date: July 19, 2019  
Time: 2:00 P.M.  
Dept: 23 (Complex Civil Litigation)  
Judge: Honorable V. Raymond Swope

FILING DATE: April 10, 2015  
TRIAL DATE: April 25, 2019

1 This case can and should finally move forward. Defendants Facebook, Inc. (“Facebook”), Mark  
2 Zuckerberg, Christopher Cox, Javier Olivan, Samuel Lessin, Michael Vernal, and Ilya Sukhar submit the  
3 following Case Management Statement in advance of the Case Management Conference (“CMC”) set for  
4 July 19, 2019.

5 There are no grounds for Plaintiff Six4Three, LLC (“Six4Three”), its principals, or its prior  
6 counsel to delay the Court’s and Facebook’s investigations into the many violations of this Court’s orders  
7 that have come to light. The CMC should proceed as scheduled. And, no matter what procedural games  
8 Six4Three continues to play with the scope of its current representation, there is no dispute that it, its  
9 principals and primary investor, and its former counsel all have lawyers.

10 For the CMC to be productive, Facebook requests that the Court issue an order requiring  
11 Six4Three, Mr. Kramer, Mr. Scaramellino, Mr. Godkin, and Mr. Gross to be represented by counsel—  
12 *without limitations*—at the July 19 CMC. Six4Three must be represented by full-scope counsel, not its  
13 purported limited-scope representation by Macdonald Fernandez LLP (“Macdonald Fernandez”), so that  
14 it can meaningfully participate in the CMC and discovery.

15 At the CMC, Facebook will request that the Court lift the discovery stay and:

- 16 (1) set briefing schedules for Facebook to move to compel document production from Mr.  
17 Godkin and Mr. Gross, pursuant to the document subpoenas Facebook served *four*  
18 *months ago*;
- 19 (2) order Mr. Scaramellino and Mr. Kramer to provide their addresses for service of  
20 subpoenas;
- 21 (3) order Mr. Dehaye to appear and testify regarding his role in the disclosure of Facebook’s  
22 confidential and highly confidential information;
- 23 (4) enter Facebook’s proposed forensic examination protocol, submitted in *April*; and
- 24 (5) order Six4Three to respond to Mark Zuckerberg, Christopher Cox, Javier Olivan, Samuel  
25 Lessin, Michael Vernal, and Ilya Sukhar’s (collectively, the “Individual Defendants”)   
26 interrogatories and requests for production relating to the long-overdue enforcement of  
27  
28

1 judgment against Six4Three.

2 The status of each of the outstanding discovery items is described below.

3 **I. THE COURT SHOULD REJECT SIX4THREE’S ATTEMPT TO DELAY DISCOVERY**  
4 **AND PROCEED WITH THE CMC ON JULY 19**

5 Ever since the Court learned of Six4Three and its former legal team’s violations of the Court’s  
6 orders, Six4Three has delayed the investigation into its misconduct with one scheme after another. Now,  
7 after the Court has rejected Six4Three’s untimely peremptory challenge, Six4Three seeks to delay  
8 discovery into its misconduct yet again. In its case management statement, Six4Three asks the Court to  
9 extend the stay of discovery and postpone the CMC for “three months, *or more*.” Case Management  
10 Statement at Attachment 1 (July 12, 2019) (emphasis added).

11 There is no basis for extending the stay of discovery and postponing the CMC. Discovery can  
12 and should proceed, as described in this case management statement. *See infra* at Section III.  
13 Six4Three’s sole basis for the requested stay is that it intends to file a writ on the Court’s denial of its  
14 untimely Section 170.6 challenge. Case Management Statement at Attachment 1 (July 12, 2019). But  
15 Six4Three’s only argument for writ relief is that it believes the all-purpose-assignment rule does not  
16 apply to a challenge filed by an attorney. *See* Verified Statement of Disqualification (Code Civ. Proc. §  
17 170.3(c)(1)) at ¶ 3 (July 12, 2019). The Court has already considered and rejected this argument, and for  
18 good reason. Order Striking Plf. Counsel Macdonald Fernandez LLP’s Peremptory Challenge  
19 Application Pursuant to CCP Section 170.6 at 2 (July 9, 2019). As explained in Facebook’s objection to  
20 Six4Three’s untimely challenge, there is no exception to Section 170.6 that resets the 15-day clock for  
21 peremptory challenges when new counsel enters a case that has been assigned to a judge for all purposes  
22 for 18 months. *See* Obj. to Six4Three’s Limited-Scope Counsel’s Section 170.6 Challenge at 4–5 (July  
23 5, 2019); *see also* Civ. Proc. Code § 170.6(a)(2) (“If directed to the trial of a civil cause that has been  
24 assigned to a judge for all purposes, the motion shall be made to the assigned judge or to the presiding  
25 judge by a party within 15 days after notice of the all purpose assignment . . .”). Six4Three’s intent to  
26 file a writ on its untimely Section 170.6 challenge is not grounds for extending the discovery stay and  
27 postponing the CMC. If it were, a party could simply derail a litigation at will by bringing on counsel to  
28 file an untimely Section 170.6 challenge, and then, when the challenge is rightly rejected, demand a

1 months-long stay to pursue a (meritless) writ on the untimely challenge. Such a result would make a  
2 mockery out the Section 170.6 process and effectively write the timeliness requirement out of the statute.

3 Moreover, Six4Three's purported intent to file a writ does not warrant the extraordinary relief of  
4 a stay. **First**, Six4Three has not even filed the writ yet. This is not the first time that the Court has been  
5 asked to stay proceedings on the basis of an anticipated writ petition that may or may not ever get filed.  
6 As the Court itself has noted, there were "multiple representations" that a writ would be filed on its  
7 crime-fraud ruling, which was issued 119 days ago. Hr'g Tr. at 4:10–12 (May 10, 2019). That writ still  
8 has not been filed. **Second**, the request for a stay of three months or more is excessive on its face.  
9 Six4Three itself recognizes that a writ petition regarding the disqualification of a judge must be filed  
10 within "10 days after service of written notice of entry of the court's order determining the question of  
11 disqualification," with a five-day extension for service by mail. Case Management Statement at  
12 Attachment 1 (July 12, 2019); Cal. Civ. Proc. Code § 170.3(d). That Six4Three nonetheless asks for a  
13 stay of this case for **three months or more** confirms that its interest is not in prompt resolution of a  
14 untimely Section 170.6 challenge but to continue to delay the investigation into its wrongdoing even as  
15 we now are on the eve of the 8-month mark from the first revelation of Six4Three and its former legal  
16 team's misconduct.

17 The Court should deny Six4Three's request, proceed with the CMC on July 19, and allow  
18 discovery into Six4Three and its former legal team's violations of the Court's orders to proceed at last.

19 **II. SIX4THREE MUST HAVE COUNSEL WHO CAN MOVE THE CASE FORWARD**  
20 **BEFORE THE CMC**

21 Consistent with its now years-long disregard for this Court's orders, Six4Three disobeyed the  
22 Court's order to find counsel by June 28, 2019. Rather than secure counsel to represent it going  
23 forward—and in contrast to Mr. Kramer's unqualified representation that he had secured counsel for  
24 Six4Three (*see* Decl. of Theodore Kramer re Order Regarding Retention of Counsel by Pl. Six4Three,  
25 LLC ¶ 2 (July 1, 2019) ("Kramer Decl.") ("I executed a retainer agreement with a law firm on behalf of  
26 Plaintiff Six4Three, LLC, for representation of Plaintiff in the present matter."))—Six4Three's new  
27  
28

1 counsel now claims that its representation is limited to a motion that has not even been filed and possibly  
2 also to a “discovery issue.”<sup>1</sup> Notice of Limited Scope Representation § 2.c. (July 2, 2019) (“Notice of  
3 Representation”); Reply in Supp. of Peremptory Challenge at 3 (July 8, 2019). What’s worse,  
4 Six4Three’s counsel filed a facially defective—and desperate—challenge to this Court in a transparent  
5 effort to avoid the judge whose orders Six4Three disregarded. Request for Peremptory Challenge  
6 Pursuant to Code of Civ. Proc. § 170.6 (July 3, 2019); *see also* Obj. to Six4Three’s Limited Scope  
7 Counsel’s Civ. Proc. Code § 170.6 Challenge at 4–6 (July 5, 2019). Six4Three’s delays and  
8 disobedience need to end: Six4Three must find full-scope representation *immediately*, and counsel must  
9 appear at the July 19, 2019 CMC so that this case and discovery into Six4Three and its former legal  
10 team’s misconduct can proceed.

11 Last month, the Court instructed Six4Three to retain full-scope counsel. Order Regarding  
12 Retention of Counsel by Pl. Six4Three, LLC and Setting Case Mgmt. Conference for July 19, 2019 at 1  
13 (June 19, 2019) (“Counsel Retention Order”). The Court had stayed discovery solely because Six4Three  
14 was “unrepresented by counsel.” Order on Birnbaum & Godkin, LLP’s *Ex Parte* Appl. to Stay Disc. at 2  
15 (June 10, 2019). Thus, citing Six4Three’s “dilatory” efforts to retain counsel, the Court set a deadline of  
16 June 28 for Six4Three to find new counsel so that the case could move forward. *See* Counsel Retention  
17 Order at 1; *see also* Hr’g Tr. at 15:3–10 (June 7, 2019); *see also id.* at 4:14–22. It is clear from the record  
18 that the Court intended Six4Three to find full-scope counsel and that Mr. Kramer, Six4Three’s CEO,  
19 fully understood this instruction.

20 The Court charged Mr. Kramer “to retain counsel so that you can defend against *any* actions that  
21 may be pursued by Facebook.” Hr’g Tr. at 8:8–10 (June 7, 2019) (emphasis added). Mr. Kramer stated  
22 that he understood. *Id.* at 8:11. The Court further informed Mr. Kramer that if he could not find “a one  
23 size fits all firm that handles corporate representation in litigation as well as a contempt citation[,]” then  
24 Mr. Kramer would “need a second lawyer that specializes in defending contempt citations.” *Id.* at 4:23–  
25 5:4. Mr. Kramer told the Court, “Yes, I understand, Your Honor.” *Id.* at 5:6. Six4Three needed to find  
26

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27 <sup>1</sup> A motion for sanctions has not been filed because the discovery ordered by the Court was stalled by  
28 Six4Three’s prior counsel’s “unwaivable conflict.”

1 counsel to fully represent it in this case, and if it needed to, it could find additional counsel for any  
2 sanctions or contempt proceedings. The Court reiterated this when it informed Mr. Kramer’s personal  
3 counsel that “notwithstanding the contempt matters, [Mr. Kramer] does have to have representation in  
4 any event for the corporation. . . . And that needs to be done. . . . I haven’t seen any evidence of that  
5 being addressed. That’s why I went through the outline of having one or two lawyers being retained in  
6 the end.” *Id.* at 10:26–11:9.

7        Instead of finding counsel so that this case could proceed, Six4Three retained counsel for limited  
8 scope representation only. The exact nature of Macdonald Fernandez’s representation of Six4Three is  
9 unclear—Mr. Kramer initially stated in his Declaration that he had retained counsel for Six4Three, full  
10 stop. He did not identify any limitations to Macdonald Fernandez’s representation of Six4Three. *See*  
11 Kramer Decl. ¶ 2 (“I executed a retainer agreement with a law firm on behalf of Plaintiff Six4Three,  
12 LLC, for representation of Plaintiff in the present matter.”). The next day, Macdonald Fernandez stated  
13 that its representation was only for the limited scope of “defend[ing] a motion for sanctions” and  
14 “appear[ing] at the case management conference set for July 19, 2019.” Notice of Representation § 2.c.  
15 If this were true, then Six4Three’s retention of counsel would not be the full-scope representation that  
16 would allow the case to proceed—including, for example, discovery related to Six4Three and its former  
17 legal team’s violations of the Court’s orders—and that is **not** what the Court intended. The Court  
18 instructed Mr. Kramer that Six4Three should find “corporate representation” first, and then **also** find  
19 separate counsel for any sanction or contempt proceedings, not just find the latter. Hr’g Tr. at 4:14–19,  
20 4:25–5:1 (June 7, 2019). Indeed, given that Facebook has not filed a “motion for sanctions,” it is unclear  
21 whether Macdonald Fernandez represents Six4Three at all at present. Because Macdonald Fernandez  
22 initially stated that its representation is “strictly limited” to “defending a motion for sanctions **if brought**”  
23 and “appearing at the case management conference,” Six4Three may effectively **still be unrepresented**.  
24 Notice of Representation § 2.c (emphasis added).

25        And to add even more confusion to the mix, Macdonald Fernandez stated on July 8 that it had  
26 “agree[d] to represent Plaintiff in connection with **the discovery issue**, the upcoming case management  
27 conference and in **any other matter that counsel may yet agree to handle . . .**” Reply in Supp. of  
28 Peremptory Challenge at 3 (July 8, 2019) (emphases added). Macdonald Fernandez’s Notice of

Representation does not refer to any discovery issue. This muddies the waters as to whether or not Six4Three is represented in relation to the discovery ordered by the Court in its crime-fraud ruling. This is yet another stalling tactic—Mr. Kramer’s delay in finding new counsel for Six4Three has stalled proceedings in this case for months, and his retention of limited-scope counsel for Six4Three, and that counsel’s changing story about the scope of its representation, exacerbates that problem.

It has been more than seven months since Birnbaum & Godkin, LLP (“Birnbaum & Godkin”) and Gross & Klein LLP (“Gross & Klein”) informed Six4Three that it needed new counsel. Hr’g Tr. at 19:6–21, 37:9–11 (Nov. 30, 2018). The Court has been extremely generous in allowing Six4Three plenty of time to retain counsel, and in return, Six4Three has flouted the Court’s orders once again. As CEO for Six4Three, Mr. Kramer needs to find full-scope counsel for Six4Three before the CMC so that this case can proceed.

### **III. OUTSTANDING DISCOVERY SHOULD PROCEED IMMEDIATELY**

On March 15, after extensive briefing and oral argument, the Court held that the crime-fraud exception to privilege applied in this case. The Court therefore reopened discovery, and directed Facebook to serve document requests that were reviewed by the Court. *See* Order Re: Def. Facebook’s Mot. to Open Disc. & to Compel at 13 (Mar. 15, 2019) (“March 15 Order”). The Court also found that depositions could proceed after document discovery. *Id.*

Despite the March 15 Order, we are no closer to getting to the bottom of the breaches of the protective order, the Court’s November 1, 2018 sealing order, the Court’s November 20, 2018 order prohibiting disclosure of documents, or the improper dissemination of Facebook’s confidential and highly confidential information than we were before. Six4Three and its former legal team have not produced a single document or shred of information since March 15.

The status of each of the outstanding discovery items is described below; much of it may be familiar to the Court from Facebook’s April 19, 2019 discovery letter brief. Due to the stay of discovery caused by Six4Three’s lack of counsel, there has been no progress since April 19. In order for Six4Three and its legal team’s violations of the integrity of the Court’s orders to be taken seriously, it is urgent that discovery finally proceed.

1           **A.     The Court Should Set a Briefing Schedule for Facebook’s Motions to Compel**  
2           **Document Production from, and Depositions of, Mr. Godkin and Mr. Gross.**

3           Pursuant to the March 15 Order, Facebook served document and deposition subpoenas on Mr.  
4           Godkin and Mr. Gross, Six4Three’s former counsel, in March. Both Mr. Godkin and Mr. Gross objected  
5           to the subpoenas. Facebook met and conferred with Mr. Godkin’s counsel and Mr. Gross’s counsel, but  
6           Mr. Godkin and Mr. Gross continue to stand on their objections. The status of the meet and confers and  
7           objections are described in more detail below. Because the parties are at an impasse, Facebook  
8           respectfully requests that the Court set hearing dates and a briefing schedule for Facebook to move to  
9           compel the production of documents from Mr. Godkin and Mr. Gross, with depositions to occur after  
10          document production is complete.

<b>Filing</b>	<b>Proposed Deadline</b>
Facebook’s motion to compel as to Mr. Godkin	August 2, 2019
Facebook’s motion to compel as to Mr. Gross	August 2, 2019
Mr. Godkin and Mr. Gross’s opposition papers	August 16, 2019
Facebook’s reply papers	August 23, 2019
Hearing	August 30, 2019, or at the Court’s earliest convenience

17           **1.     Mr. Godkin Refuses to Produce Documents Pursuant to the Court’s March**  
18           **15 Order.**

19           In accordance with the March 15 Order, Facebook served document and deposition subpoenas on  
20           Mr. Godkin on March 22, 2019. Counsel for Facebook and Mr. Godkin met and conferred regarding Mr.  
21           Godkin’s objections to these subpoenas on April 19, 2019. Mr. Godkin agreed to produce any “non-  
22           privileged” documents responsive to Facebook’s requests, and to serve a privilege log, but refused to  
23           produce any allegedly privileged documents. Mr. Godkin’s only bases for the assertion of privilege were  
24           that (1) someone might seek writ review of the March 15 Order, and (2) Mr. Kramer instructed Mr.  
25           Godkin not to produce any allegedly privileged documents.

26           The problem with Mr. Godkin’s assertions of privilege, however, is that his arguments amount to  
27           a disregard for the March 15 Order, which held that privilege was waived pursuant to the crime-fraud  
28           exception. The Court should reject these objections pursuant to its authority to enforce its orders. *See*



1 Civ. Proc. Code § 128(a)(4). The fact that someone may at some point file a writ on the March 15 Order  
2 provides no basis to refuse to produce documents now.

3 The Court should also reject Mr. Godkin’s objection to the deposition subpoena. Mr. Godkin  
4 claims that the subpoena is premature, but this misstates the record. The Court found that “Facebook has  
5 demonstrated the necessity of deposing Six4Three’s counsel and members of its legal team[.]” March 15  
6 Order at 10:13–14. Facebook served a deposition subpoena and informed Mr. Godkin that Facebook was  
7 willing to discuss a mutually agreeable date. Mr. Scaramellino raised a similar objection to Facebook’s  
8 attempt to serve a deposition subpoena, and the Court rejected this objection. *See* Case Mgmt. Order No.  
9 21 at 1:27–28 (Apr. 2, 2019) (“Mr. Scaramellino’s assertion that the subpoenas served on, *inter alios*,  
10 Mr. Scaramellino conflicts with the Court’s order is incorrect.”). The Court should overrule this  
11 objection and permit the deposition to proceed after document production.

12 **2. Mr. Gross Refuses to Produce Documents Pursuant to the Court’s March 15**  
13 **Order.**

14 In accordance with the March 15 Order, Facebook served document and deposition subpoenas on  
15 Mr. Gross on March 22, 2019. Counsel for Facebook and Mr. Gross met and conferred regarding Mr.  
16 Gross’s objections to these subpoenas on April 15, 2019. Mr. Gross refuses to produce *any* documents  
17 responsive to Facebook’s document subpoena until the Court of Appeal affirms this Court’s March 15  
18 Order. His disregard for this Court’s authority is astounding: while meeting and conferring, Mr. Gross’s  
19 counsel stated, “[W]e actually need an order from the Court of Appeals before any kind of documents are  
20 produced. . . . I don’t think the order from Judge Swope[] is correct.” His recalcitrance could be several  
21 things—an act of contempt (*see, e.g.*, Civ. Proc. Code §§ 1209(a)(10), 2020.240); a sanctionable abuse of  
22 the discovery process (*see* Civ. Proc. Code § 2023.010(e)); or a dereliction of an attorney’s duty to  
23 “maintain the respect due to the courts of justice and judicial officers” (*see* Bus. & Prof. Code § 6068(b)).  
24 But it is not a valid discovery objection.

25 **a. Mr. Gross’s General Objections to Facebook’s Subpoena are**  
26 **Meritless.**

27 In addition to objecting to Facebook’s document subpoena on the basis that he disagrees with the  
28 March 15 Order, Mr. Gross also raised general and specific objections. His general objections are based

1 on a “conflict of interest,” form, and notice. But no conflict of interest prevents him from responding to  
2 the subpoena. During the meet and confer, Facebook confirmed that the “conflict of interest” objection  
3 did not relate to Mr. Gross’s motion to withdraw as counsel. Instead, the objection arises from  
4 Six4Three’s instruction that Mr. Gross produce nothing in response to the subpoena. Mr. Gross’s  
5 counsel refused to explain the basis for the instruction, or who communicated it. A client’s request,  
6 without more, does not excuse a law firm from production obligations. *See* Bus. & Prof. Code § 6068(a).

7 Mr. Gross’s objections as to form also lack merit. He complains that the subpoena for records  
8 and testimony specified different dates for document production and deposition. But Facebook complied  
9 with every requirement for such subpoenas: Facebook gave Mr. Gross “a reasonable opportunity to  
10 locate and produce any designated business records, documents, electronically stored information, and  
11 tangible things”—i.e., almost two weeks. Civ. Proc. Code § 2020.220(a). Facebook provided “a  
12 reasonable time to travel to the place of deposition.” *Id.* Finally, Facebook’s subpoena complied with  
13 Civil Procedure Code section 2020.510. Mr. Gross has not named a provision that Facebook missed.

14 As for notice, Mr. Gross’s objection is facially baseless. He argues that under Civil Procedure  
15 Code section 1985.3, which requires notice when a subpoena seeks information “pertaining to a  
16 consumer,” Facebook had to give notice to Six4Three. Section 1985.3(a)(2) defines “consumer” as “any  
17 individual, partnership of five or fewer persons, association, or trust which has transacted business with,  
18 or has used the services of, the witness or for whom the witness has acted as agent or fiduciary.” Civ.  
19 Proc. Code § 1985.3(a)(2). A limited liability company is none of those things. In particular,  
20 interpreting “association” to include every corporate entity would render other statutory text—most  
21 obviously, “partnership *of five or fewer persons*”—surplusage. *Id.* (emphasis added). Moreover,  
22 reading that section to include Six4Three would produce absurd results: The section’s purpose “is to  
23 give the consumer notice and an opportunity to object to disclosure of private information.”  
24 *Conservatorship of S.A.*, 25 Cal. App. 5th 438, 444 (2018), *review denied* (Oct. 10, 2018). Six4Three  
25 had notice and opportunity: Facebook served virtually identical requests on Six4Three in March, and  
26 Six4Three instructed Mr. Gross and Mr. Godkin not to comply with Facebook’s subpoenas. Mr. Gross’s  
27 threshold consumer notice objection cannot stand.  
28

1                                   **b.      Mr. Gross’s Specific Objections to Facebook’s Subpoena Are Also**  
2                                   **Meritless.**

3                    Like his general objections, Mr. Gross’s specific objections to Facebook’s document requests also  
4                    lack merit.

5                    **First**, Mr. Gross’s privilege objections disregard this Court’s March 15 Order. Mr. Gross objects  
6                    to each request on the basis of the “attorney client privilege, the work product doctrine, and any other  
7                    applicable privilege . . . .” But this Court ruled that the attorney-client privilege was waived pursuant to  
8                    the crime-fraud exception. *See* March 15, 2019 Order at 13:16–17. And Facebook served only the  
9                    requests authorized by the Court, which on their face, reasonably relate to Six4Three’s illegal disclosure  
10                  of Facebook’s confidential and highly confidential information. *See* March 15 Order at 13:12–15.  
11                  Nevertheless, Mr. Gross’s lawyer stated that Mr. Gross intends to withhold communications as privileged  
12                  at least “until the Court of Appeals weighs in.” Facebook asked, “[Y]ou don’t think the order from Judge  
13                  Swope[] is sufficient?” Mr. Gross’s lawyer: “No. . . . [T]he Court of Appeals is going to have to either  
14                  reverse him or send back [] instructions on how to tailor the actual scope of the waiver provision[.]”  
15                  Incredibly, Mr. Gross has taken these positions ***without even filing a writ***. To the extent Mr. Gross  
16                  stands on his privilege objection based on California’s work product protection, his work product log is  
17                  now long overdue. *See* March 15 Order at 13:16–17 (“A work product log shall be served for any  
18                  documents withheld on those grounds.”).

19                  **Second**, Mr. Gross objects that every request is overbroad and burdensome.<sup>2</sup> But Mr. Gross fails  
20                  to grapple with the fact that the Court granted leave to serve these exact requests. *See* March 15 Order at  
21                  13:12–15. He also fails to make the showing required for a burden objection. An “objection based upon  
22                  burden must be sustained by evidence showing the quantum of work required[.]” *West Pico Furniture*  
23                  *Co. v. Superior Court (Pac. Fin. Loans)*, 56 Cal. 2d 407, 417 (1961). Neither Mr. Gross’s written  
24                  objections, nor counsel’s explanations while conferring, show the “quantum of work required” to respond

25                  <sup>2</sup> Mr. Gross raises his burden objection under various labels that add no different substance. For  
26                  example, he objects to requests 1, 2, 3, 5, and 6 “to the extent [they] require[] answers greater than,  
27                  beyond the requirements of, and/or at variance to applicable California law.” Mr. Gross’s lawyer  
28                  conceded that this objection encompassed only Mr. Gross’s objections as to burden and as to the  
                 subpoena’s compliance deadline. As to each of these objections, Facebook’s responses to Mr. Gross’s  
                 burden objections are equally applicable.

1 to Facebook’s document requests. Mr. Gross’s lawyer argued only that Mr. Gross “has a business to  
2 run” and “clients to serve,” such that participating in the Court’s investigation into these issues is “an  
3 extreme burden.” These generalized allegations of burden are insufficient: “some burden is inherent in  
4 all demands for discovery,” and so “[t]he objection of burden is valid only when that burden is  
5 demonstrated to result in injustice.” *West Pico*, 56 Cal. 2d at 418.

6 **Third**, Mr. Gross objects that Facebook’s subpoena may call for confidential information, but  
7 concedes that he may rely on the Stipulated Protective Order to protect such information from disclosure.  
8 *See* Stip. Protective Order ¶ 1 (Oct. 25, 2016) (“A party or non-party may designate as Confidential. . .  
9 any document or response to discovery which . . . contain[s] . . . confidential . . . information[.]”) During  
10 meet and confer, Mr. Gross’s counsel confirmed that the protective order’s provisions should be  
11 sufficient “just so long as information like that isn’t in the public record.”

12 **Fourth**, Mr. Gross’s boilerplate vagueness objections must be overruled.<sup>3</sup> California courts  
13 sustain vagueness objections only where a discovery request precludes “intelligent reply.” *Cembrook v.*  
14 *Superior Court (Sterling Drug, Inc.)*, 56 Cal. 2d 423, 430 (1961). Facebook’s requests are not so  
15 vague—indeed, Facebook’s subpoena defined the only term about which Gross’s lawyer complained  
16 during the meet and confer: “documents.”

17 **B. The Court Should Order Mr. Scaramellino to Provide His Address for Service.**

18 Facebook acknowledges that it has raised this issue with the Court before. Unfortunately, despite  
19 Facebook’s best efforts to resolve the issue without requiring further intervention by the Court, the issue  
20 remains unresolved. Mr. Scaramellino, Six4Three’s sole investor, continues to evade Facebook’s  
21 attempts to serve subpoenas. Mr. Scaramellino played a central role in the disclosure of Facebook’s  
22 confidential and highly confidential information, and yet due to his and his counsel’s refusal to  
23 cooperate, Facebook has not even been able to serve subpoenas on Mr. Scaramellino to start the  
24 discovery process.

25  
26 <sup>3</sup> Mr. Gross raises his vagueness objection under various labels. For example, he objects to  
27 Requests 1, 2, 3, 5, and 6 on the grounds that, “it may not be possible to identify responsive documents  
28 based on the wording of the request.” Mr. Gross’s lawyer conceded that this objection made no  
argument beyond the vagueness objection.

1 It has been *four months* since Facebook first contacted Mr. Russo (Mr. Scaramellino’s counsel)  
2 and asked him to either accept service of a subpoena to Mr. Scaramellino or provide Mr. Scaramellino’s  
3 address. Mr. Russo refused to discharge that most basic of a lawyer’s tasks: accepting service on behalf  
4 of one’s client. *See, e.g.,* California Attorney Guidelines of Civility & Professionalism, Section 4(h)  
5 (“An attorney should agree to reasonable requests in the interests of efficiency and economy, including  
6 agreeing to a waiver of procedural formalities where appropriate.”), *available at*  
7 [http://www.calbar.ca.gov/Portals/0/documents/ethics/Civility/Atty-Civility-Guide-Revised\\_Sept-](http://www.calbar.ca.gov/Portals/0/documents/ethics/Civility/Atty-Civility-Guide-Revised_Sept-2014.pdf)  
8 [2014.pdf](http://www.calbar.ca.gov/Portals/0/documents/ethics/Civility/Atty-Civility-Guide-Revised_Sept-2014.pdf); Santa Clara County Bar Ass’n Code of Professionalism at § 9 (“A lawyer should conduct  
9 discovery in a manner designed to ensure the timely, efficient, cost-effective, and just resolution of a  
10 dispute.”), *available at* <https://sccba.site-ym.com/page/professionalism#9>. And since then, Facebook has  
11 spent thousands of dollars on a wild goose chase, trying to serve Mr. Scaramellino at multiple addresses  
12 identified by Mr. Russo or by Mr. Scaramellino in the past.

13 First, Mr. Russo did not respond to Facebook’s request for days, and then belatedly provided an  
14 address for a summer vacation complex in Forestburgh, New York. Facebook attempted to serve Mr.  
15 Scaramellino at that address multiple times, but unsurprisingly, the service attempts failed.

16 Next, the Court suggested that Facebook serve Mr. Scaramellino “at his place of employment that  
17 Mr. Scaramellino previously provided in court filings.” Case Mgmt. Order No. 21 at 1 (Apr. 2, 2019).  
18 This seemingly straightforward instruction—serve Mr. Scaramellino at his workplace—also proved  
19 unnecessarily complicated and ultimately, fruitless. Facebook was unable to confirm a current work  
20 address for Mr. Scaramellino and asked his counsel to do so. (Mr. Scaramellino has represented to the  
21 Court that he is a Director of TallyGo, a company whose last known business address is in Los Angeles,  
22 while also claiming to reside in New York.) Mr. Russo refused, and accused Facebook of harassment.  
23 Left with no other option, Facebook then unsuccessfully tried to serve Mr. Scaramellino at TallyGo’s last  
24 known business address in Los Angeles. This address is an apartment, and the current tenant stated that  
25 she had been living there since November 2018, did not know of TallyGo or Mr. Scaramellino, and that  
26 there was no business located at that address.

27 In all, Facebook attempted to serve Mr. Scaramellino multiple times over the course of four  
28 weeks at four addresses in two states (in Manhattan, in Los Angeles, and at two addresses in Sullivan

1 County, New York, which Mr. Scaramellino revealed for the first time as his “home county” in his  
2 declaration of April 12, 2019) using four different process servers.

3 The Court should put a stop to the evasion. Mr. Russo should show cause why he will not accept  
4 service or provide a correct address. *See In re Holmes*, 145 Cal. App. 3d 934, 944 (1983) (finding a  
5 lawyer in contempt for “knowingly and intentionally aiding another person to evade service of a  
6 subpoena by obstructing the service of the subpoena”). Or, if he continues to refuse, Facebook requests  
7 that the Court (1) order Mr. Scaramellino to provide a correct address for service of Facebook’s  
8 subpoena; or (2) order Mr. Scaramellino to appear, testify, and submit to cross-examination. At this  
9 point, Mr. Scaramellino—who is an investor and advisor to a party in this litigation, was litigating this  
10 case as a member of the legal team, and who expressly subjected himself to this Court’s jurisdiction  
11 when he subscribed to the protective order—is willfully evading this Court’s investigation into the crime  
12 or fraud. And Mr. Russo is helping him do so. Facebook thus renews its request that the Court order Mr.  
13 Russo to accept service or Mr. Scaramellino to provide an address for service of a subpoena.

14 In the alternative, Facebook asks that the Court order Mr. Scaramellino to appear, testify, and  
15 submit to cross-examination about the disclosure of Facebook’s confidential and highly confidential  
16 information. The Court has the power to compel appearance and testimony. *See Civ. Proc. Code* §§  
17 128, 187 & 2031.060; *Cates v. Cal. Gambling Control Comm’n*, 154 Cal. App. 4th 1302, 1314 (2007);  
18 *Koehler v. Superior Court*, 181 Cal. App. 4th 1153, 1157 (2010). Section 128(a)(6) of the Civil  
19 Procedure Code provides the Court authority “[t]o compel the attendance of persons to testify in an  
20 action or proceeding pending therein[.]” *Civ. Proc. Code* § 128(a)(6); *see also Silvagni v. Superior Court*  
21 *(Youngblood)*, 157 Cal. App. 2d 287, 292 (1958) (discussing “the unquestioned power of the court to  
22 compel [a civil litigant’s] presence as a witness”). That power is protected by the provisions of the Civil  
23 Procedure Code that let the Court issue bench warrants for failure to appear. *See, e.g., Civ. Proc. Code*  
24 *§ 1993(a)(1)* (“[T]he court may issue a warrant for the arrest of . . . a person who failed to appear  
25 pursuant to a court order.”). The Court would be well within its discretion to compel Mr. Scaramellino to  
26 appear and testify about the disclosure of Facebook’s confidential and highly confidential information.

27 **C. The Court Should Order Mr. Kramer to Confirm His Address for Service.**

28 At the May 10 CMC, the Court ordered Mr. Kramer to file a notice of his contact information,

1 including his mailing address, so that Six4Three could receive mail service of documents going forward.  
2 Order Resetting CMC to June 7, 2019 (May 31, 2019). On June 17, Mr. Kramer filed a notice stating  
3 that his mailing address was 1267 Chestnut Street, Apt. 6, San Francisco, CA 94109. Notice of Theodore  
4 Kramer's Contact Information (June 17, 2019). However, it is questionable whether that is actually Mr.  
5 Kramer's address. In May, Facebook attempted to serve document and deposition subpoenas on Mr.  
6 Kramer at that address, and made seven service attempts. None were successful. In June, just a week  
7 before Mr. Kramer filed the notice identifying the Chestnut Street address as his address, Facebook  
8 attempted to serve other documents on Mr. Kramer, but the process server was told that "Ted [Kramer]  
9 no longer lives here." Declaration of Diligence of Jose Rico, attached hereto as **Exhibit A**. In light of  
10 this information, Facebook respectfully requests that the Court order Mr. Kramer to confirm, under  
11 penalty of perjury, his address for service of process.

12 **D. The Court Should Order Paul-Olivier Dehaye to Appear and Testify.**

13 Since January, the Parties and the Court have known that Six4Three contemplated a scheme  
14 whereby a retained "expert" would serve as an anonymous source for media reporting on Six4Three's  
15 allegations. In early March, after Facebook's documents continued to leak, the Court ordered Six4Three  
16 to produce a declaration from its experts swearing that they never disclosed or discussed Facebook's  
17 confidential or highly confidential information in violation of the protective order. *See* Case Mgmt.  
18 Order No. 19 ¶¶ 3–4 (Mar. 1, 2019). Paul-Olivier Dehaye, the purported "expert" who Six4Three and its  
19 legal team floated to journalists as an anonymous source, did not comply.

20 Instead, Mr. Dehaye demanded that Facebook drop its request that he attest to his compliance  
21 with the protective order. He refused to say if he had disclosed or discussed Facebook's confidential and  
22 highly confidential information with journalists. He conceded that he "did not . . . give a detailed  
23 analysis to the terms of the Protective Order" and now "realize[s] that the terms of the Protective Order  
24 are complex and require detailed analysis." Decl. of Paul-Olivier Dehaye ¶ 8(c) (Mar. 22, 2019). Far  
25 from swearing to his compliance, Mr. Dehaye equivocated: "In order for me to fully explain what I have  
26 or have not done, I will need further legal advice and a deep consideration of all documents and  
27 communications." *Id.* However, he produced a protective order certification proving that he  
28 "consent[ed] to the jurisdiction of the San Mateo County Superior Court for the purpose of enforcing the

1 Order[.]” *Id.* Ex. G at 033.

2 Facebook requested Mr. Dehayé’s documents within days of the March 15 Order opening  
3 discovery. Specifically, Facebook served Six4Three with requests for documents regarding disclosures  
4 of Facebook’s information. Facebook made clear that those requests reached communications by “ANY  
5 other agent or representative of SIX4THREE, including but not limited to any retained expert or  
6 consultant.” Given Six4Three’s lack of cooperation and the Court’s order relieving Six4Three’s counsel  
7 from representing the entity, Facebook has been unable to obtain any documents that would shed light on  
8 what Mr. Dehayé did with Facebook’s confidential and highly confidential information in hand.  
9 Moreover, even if Facebook were ultimately to get Mr. Dehayé’s documents, they would not provide a  
10 complete picture of his (mis)conduct. The limited documents we have confirm that Six4Three’s legal  
11 team contemplated phone calls involving Mr. Dehayé. Accordingly, investigation into Six4Three’s  
12 violations of this Court’s orders requires that the Court compel Mr. Dehayé’s appearance and testimony.  
13 *See pp. 11–12, supra* (describing Court’s authority to compel witness attendance and testimony).

14 **E. The Court Should Enter Facebook’s Proposed Forensic Examination Protocol.**

15 Pursuant to the March 15 Order, Facebook submitted its proposed parameters for searches for  
16 electronic documents collected and transferred to the neutral third-party forensic examiner in Exhibit A  
17 to its April 19, 2019 letter brief. The proposed forensic examination protocol is attached hereto as  
18 **Exhibit B** for the Court’s convenience. Facebook’s proposal calls for an expedited, comprehensive  
19 analysis of each preserved storage device or account. The proposed protocol sets forth relevant search  
20 terms, which include the e-mail domains of journalists and regulators with whom Six4Three and its legal  
21 team communicated.

22 Counsel for Mr. Kramer and Mr. Scaramellino objected to Facebook’s proposed protocol, but the  
23 objections lack merit. **First**, Facebook’s proposed protocol is not “unacceptably broad.” Facebook  
24 derived the proposed search terms from Birnbaum & Godkin’s and Gross & Klein’s preliminary  
25 document productions, which show the third parties with whom Six4Three or its legal team  
26 communicated. The terms are unquestionably relevant to the investigation of Mr. Scaramellino’s and  
27 Mr. Kramer’s violations. **Second**, the proposed protocol sets a date restriction on searches. The search  
28 shall include all documents created, modified, or accessed between March 1, 2018 through the present—



1 the same date range that Birnbaum & Godkin's and Gross & Klein's preliminary document productions  
2 show to be relevant. **Finally**, Mr. Kramer's and Mr. Scaramellino's privilege objections lack merit.  
3 Facebook crafted a search protocol, the results of which will not require privilege review by Mr.  
4 Kramer's and Mr. Scaramellino's personal counsel. Many of the results of the search terms are expected  
5 to be communications with third parties that could never be privileged to begin with. And more  
6 fundamentally, each proposed search term reasonably relates to the crime or fraud perpetrated by  
7 Six4Three and its legal team. The privilege objections appear to be little more than an attempt at further  
8 delay.<sup>4</sup> Mr. Kramer and Mr. Scaramellino offered no counterproposal, and instead simply objected. The  
9 Court should approve Facebook's proposed protocol so that the limited discovery opened by the March  
10 15 Order may proceed.

11 **F. Six4Three Must Respond to the Individual Defendants' Interrogatories and**  
12 **Document Requests.**

13 After the Court granted the Individual Defendants' motion for attorney's fees relating to their  
14 successful anti-SLAPP motion, the Individual Defendants served interrogatories and requests for  
15 production on Six4Three on May 3, 2019. These discovery requests relate to Six4Three's ability to pay  
16 the award of attorney's fees. Six4Three took the position that this discovery was stayed as part of the  
17 Court's May 10 stay of discovery due to Six4Three's lack of representation. Six4Three should not be  
18 permitted to delay any further, and must respond to the Individual Defendants' discovery requests within  
19 23 days of the lifting of the stay.

20 Dated: July 12, 2019

DURIE TANGRI LLP

21  
22 By: \_\_\_\_\_

  
CATHERINE Y. KIM

23  
24 Attorneys for Defendant  
25 Facebook, Inc., Mark Zuckerberg, Christopher Cox,  
26 Javier Olivan, Samuel Lessin, Michael Vernal, and Ilya  
Sukhar

27 <sup>4</sup> The proposed date restriction further reduces the risk that attorney-client communications related  
28 to other legal matters will return from the proposed search.

1 **PROOF OF SERVICE**

2 I am employed in San Francisco County, State of California, in the office of a member of the bar  
3 of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a  
4 party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

5 On July 12, 2019, I served the following documents in the manner described below:

6 **FACEBOOK, INC., MARK ZUCKERBERG, CHRISTOPHER COX, JAVIER**  
7 **OLIVAN, SAMUEL LESSIN, MICHAEL VERNAL, AND ILYA SUKHAR'S CASE**  
8 **MANAGEMENT STATEMENT**

- 9 ☒ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Durie  
10 Tangri LLP for collection and processing of correspondence for mailing with the United  
11 States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to  
12 be placed in the United States Postal Service at San Francisco, California.
- 13 ☒ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through  
14 Durie Tangri's electronic mail system from CKim@durietangri.com to the email  
15 addresses set forth below.

16 On the following part(ies) in this action:

17 **VIA U.S. MAIL & EMAIL**

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10 *Attorney for Gross & Klein LLP*

11 I declare under penalty of perjury under the laws of the United States of America that the  
12 foregoing is true and correct. Executed on July 12, 2019, at San Francisco, California.  
13

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28  


Catherine Y. Kim

# **EXHIBIT A**



# **EXHIBIT B**

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

SIX4THREE, LLC, a Delaware limited liability  
company,

Plaintiff,

v.

FACEBOOK, INC., a Delaware corporation;  
MARK ZUCKERBERG, an individual;  
CHRISTOPHER COX, an individual;  
JAVIER OLIVAN, an individual;  
SAMUEL LESSIN, an individual;  
MICHAEL VERNAL, an individual;  
ILYA SUKHAR, an individual; and  
DOES 1-50, inclusive,

Defendants.

Case No. CIV 533328

**Assigned for all purposes to Hon. V. Raymond  
Swope, Dept. 23**

**STIPULATION AND [PROPOSED] ORDER  
RE: NEUTRAL FORENSIC EXAMINER**

Dept: 23 (Complex Civil Litigation)  
Judge: Honorable V. Raymond Swope

FILING DATE: April 10, 2015  
TRIAL DATE: April 25, 2019

1 In its Order Re: Defendant Facebook Inc.’s Motion to Open Discovery and to Compel, dated March 15,  
2 2019, the Court opened discovery “limited to the revealing or discussing of Facebook’s confidential  
3 information pursuant to Stipulated Protective Order, paragraph 6 and disclosures or providing thereof.”  
4 The Court further ordered counsel for Plaintiff Six4Three, LLC and Defendant Facebook, Inc.  
5 (collectively, the “Parties”) to meet and confer and propose candidates for a neutral forensic examiner to  
6 the Court on March 22, 2010 “to conduct searches on Mr. Kramer and Mr. Scaramellino’s data currently  
7 in the possession, custody, and/or control of Stroz Friedberg.” Following those submissions, the Court  
8 appointed Christopher Racich, President of Vestigant as the neutral forensic examiner (the “Forensic  
9 Examiner”) in Case Management Order No. 22, dated April 2, 2019.

10 The Court further ordered the Parties to meet and confer “on the parameters of searches for  
11 electronic documents in the possession, custody, or control of the neutral third party forensic examiner,”  
12 to be discussed at the discovery conference set for April 26, 2019 at 2:00 p.m.

13 Plaintiff Six4Three, LLC and Defendant Facebook, Inc., by and through their attorneys of record,  
14 stipulate as follows:

15 **I. SELECTION OF NEUTRAL EXPERT**

16 The Forensic Examiner will perform the work set forth in this Stipulation Re: Neutral Forensic  
17 Examiner, and consistent with the Court’s March 15, 2019 Order, Case Management Order No. 22, and  
18 any future orders from the Court. The Forensic Examiner (including all of its employees, agents, and  
19 representatives) shall not engage in *ex parte* contact or communication with any Party in relation to the  
20 work described in this Agreement or receive *ex parte* instruction from any Party in relation to the work  
21 described in this Agreement.

22 Nothing in this Agreement should be construed to prevent any Party from consulting with or  
23 obtaining advice from another computer forensic examiner or expert, other than the Forensic Examiner,  
24 in connection with this matter.

25 **II. DEVICES AND ACCOUNT SUBJECT TO ANALYSIS**

26 The Parties agree that Theodore Kramer and Thomas Scaramellino (the “Custodians”) have  
27 previously provided Stroz Friedberg with various devices and online accounts, and Stroz Friedberg has  
28 created forensic images of—or has otherwise captured the contents of—those devices and online



1 accounts. This Stipulation refers to these devices and accounts collectively as the “The Personal Devices  
2 and Accounts.”

3 For the purposes of this Stipulation, a “Forensic Image” shall include active data, deleted data,  
4 temporary files, swap or page files, any other files or data created by the operating system or software  
5 with or without the knowledge of the user, metadata, transactional data, and any other data written to and  
6 remaining on the acquired media.

7 Pursuant to the Court’s March 15, 2019 Order, Stroz Friedberg provided all Forensic Images of  
8 each of the Personal Devices and Accounts to the Forensic Examiner by April 16, 2019.

9 If the Court orders that any additional device or account be captured, then the Forensic Examiner  
10 shall make Forensic Images of each of those Personal Devices and Accounts.

11 The Forensic Examiner shall take all measures to restrict access to, maintain chain of custody,  
12 and to preserve the Forensic Images of each of the Personal Devices and Accounts. The Forensic  
13 Examiner shall disclose the Preserved Data only to counsel of record for the Parties as set forth in this  
14 Stipulation or future order of the Court.

15 If any file on the Personal Devices and Accounts has been encrypted or secured, then each  
16 Custodian shall promptly provide to the Forensic Examiner the available passwords, credentials, or other  
17 information needed to bypass any encryption or security.

18 **A. USB DRIVE REPORTS**

19 1. Within 21 calendar days after the Court enters this Stipulation and Order, the Forensic  
20 Examiner shall provide all Parties’ counsel with a “USB Drive Report” for each of the collected USB  
21 devices and external USB hard drives (each a “USB Drive”), which shall include the following, if  
22 available, for each of the USB Drives:

- 23 a. The USB Drive’s make/model, serial number, and other identifying information.  
24 b. The source from which the Forensic Examiner received the USB Drive.  
25 c. Information from all known data sources describing when and/or how the USB  
26 Drive has been used, including any information regarding its past connections to other devices.  
27 d. A complete listing of the files contained on the USB Drive. The USB Drive  
28 Reports should specify the following, if available, for each file contained on the USB Drive:

1                   i.       the file name;  
2                   ii.      the metadata associated with the file (*e.g.*, full file path, file extension, all  
3 available timestamps, MD5 hash value, and owner/creator information)  
4                   iii.     whether the file was deleted; and  
5                   iv.     whether the file was encrypted.  
6           e.       Any findings that a user took specific steps that would have the effect of making  
7 certain files unreadable. If evidence of such activities is present on the USB Drive, the Forensic  
8 Examiner shall confer with counsel for the Parties to determine whether further analysis is necessary, but  
9 shall perform no further analysis unless agreed to by the Parties.

10           2.       The USB Drive Reports described in this section shall be treated by the Parties and their  
11 counsel as Highly Confidential pursuant to the Stipulation for Protective Order in the Action.

12           3.       The Forensic Examiner shall analyze the entirety of each USB Drive, including user-  
13 created files, system files, and all other aspects of each USB drive involved in its operation. The Forensic  
14 Examiner shall also include any findings related to this analysis in its USB Drive Report.

15           **B.       COMPUTER REPORT**

16           1.       Within 21 calendar days after the Court enters this Stipulation and Order, the Forensic  
17 Examiner shall provide all Parties' Counsel with a "Computer Report," which shall include the  
18 following, if available:

19                   a.       Each Computer's make/model, serial number, and other identifying information.  
20                   b.       Activity findings from all known data sources that indicate that the Computer has  
21 been connected to any media storage device, any online account, or any other method of data storage. If  
22 so, details regarding each data source, each connected storage, and all related activity.

23                   c.       A complete listing of all files on the Computer. The Computer Report should  
24 specify the following, if available, for each file listed on the Computer Report:

25                   i.       the file name;  
26                   ii.      the metadata associated with the file (*e.g.*, full file path, file extension, all  
27 available timestamps, MD5 hash value, and owner/creator information);  
28                   iii.     whether the file was deleted; and

1                   iv.     whether the file was encrypted.

2                   d.     Any findings that a user took specific steps that would have the effect of making  
3 certain files unreadable. If evidence of such activities is present on the Computer, the Forensic Examiner  
4 shall confer with the Parties to determine whether further analysis is necessary, but shall perform no  
5 further analysis unless agreed to by the Parties.

6                2.     The Computer Report described in this section shall be treated by the Parties and their  
7 counsel as Highly Confidential pursuant to the Stipulation for Protective Order in the Action.

8                3.     The Forensic Examiner shall analyze the entirety of each Computer, including user-  
9 created files, system files, and all other aspects of each Computer involved in its operation. The Forensic  
10 Examiner shall also include any findings related to this analysis in its Computer Report.

11 **III.    ONLINE ACCOUNT REPORT**

12                4.     Within 21 calendar days after the Court enters this Stipulation and Order, the Forensic  
13 Examiner shall provide all Counsel with an “Online Account Report,” which shall include the following,  
14 if available:

15                   a.     The type of Online Account, including Dropbox, Box, Google, HushMail, iCloud,  
16 and Proton Mail.

17                   b.     The Online Account’s username, which usually relates to an associated e-mail  
18 address.

19                   c.     A complete listing of all files on each Online Account, including the following for  
20 each such file:

21                           i.     the file name;

22                           ii.    the metadata associated with the file (*e.g.*, full file path, file extension, all  
23 available timestamps, MD5 hash value, and owner/creator information);

24                           iii.   whether the file was deleted; and

25                           iv.   whether the file was encrypted.

26                   d.     Activity findings from all known data sources that indicate that the Online  
27 Account has been connected to any device. If so, details regarding each Online Account, each device,  
28 and all related activity.

1 e. Any findings that a user took specific steps that would have the effect of making  
2 certain files unreadable. If evidence of such activities is present on the Online Account, the Forensic  
3 Examiner shall confer with the Parties to determine whether further analysis is necessary, but shall  
4 perform no further analysis unless agreed to by the Parties.

5 5. The Online Account Report described in this section shall be treated by the Parties and  
6 their counsel as Highly Confidential pursuant to the Stipulation for Protective Order in the Action.

7 6. The Forensic Examiner shall analyze the entirety of each Online Account, including user-  
8 created files, system files, and all other aspects of each Online Account involved in its operation. The  
9 Forensic Examiner shall also include any findings related to this analysis in its Online Account Report.

#### 10 **IV. PHONE REPORT**

11 1. Within 21 calendar days after the Court enters this Stipulation and Order, the Forensic  
12 Examiner shall provide all Counsel with a "Phone Report," which shall include the following, if  
13 available:

14 a. The Cell Phone's make/model, serial number, and other identifying information.

15 b. Activity findings from all known data sources that indicate that the Computer has  
16 been connected to any media storage device, any online account, or any other method of data storage. If  
17 so, details regarding each data source, each data destination, and all related activity.

18 2. Where available from the format or platform involved, a complete "Cell Phone Call  
19 Report" consisting of all calls placed or received on or after March 1, 2018, including to, from, recipient  
20 name (when available), caller name (when available), date placed, and date received.

21 3. Where available from the format or platform involved, a complete "Text Message History  
22 Report" consisting of all text message header information, including to, from, recipient name (when  
23 available), sender name (when available), date sent, date received, and attachment name for text  
24 messages sent or received on or after May 1, 2018. The text of any text messages, however, shall not be  
25 provided in this initial Text Message History Report.

26 4. Where available from the format or platform involved, a complete "Contact List Report"  
27 consisting of all cell phone contacts including contact name and phone number.

28 5. Any findings that a user took specific steps that would have the effect of making certain

1 files unreadable. If evidence of such activities is present on the Cell Phone, the Forensic Examiner shall  
2 confer with the Parties to determine whether further analysis is necessary, but shall perform no further  
3 analysis unless agreed to by the Parties.

4 6. The Phone Report described in this Paragraph 4 shall be treated by the Parties and their  
5 counsel as Highly Confidential pursuant to the Stipulation for Protective Order in the Action. No  
6 privileges, claims, or rights are waived or deemed waived with respect to or in connection with the  
7 production of the Phone Report or any of the referenced files.

8 7. The Forensic Examiner shall analyze the entirety of each Phone, including user-created  
9 files, system files, and all other aspects of each Phone involved in its operation. The Forensic Examiner  
10 shall also include any findings related to this analysis in its Phone Report.

#### 11 **V. COLLECTION OF USER FILES FOR REVIEW**

12 In addition to the forensic analysis described above, the Forensic Examiner shall undertake a  
13 keyword search of all Forensic Images of each of the Personal Devices and Accounts, to identify user  
14 files containing those keywords, including but not limited to Word documents, PDFs, Excel spreadsheets,  
15 Powerpoint presentations, email, and calendar entries.

16 The search terms to be used are:

- 17 1. guardian
- 18 2. observer
- 19 3. wsj OR "wall street journal"
- 20 4. (brad AND reagan) OR brad.reagan@wsj.com
- 21 5. (eliot AND brown) OR eliot.brown@wsj.com
- 22 6. (deepa AND seetharaman) OR deepa.seetharaman@wsj.com
- 23 7. (kirsten AND grind) OR "kirsten.grind"
- 24 8. cnn
- 25 9. (donie AND o'sullivan") OR donie.o'sullivan@turner.com
- 26 10. bbc
- 27 11. "new york times" OR nyt OR nytimes
- 28 12. "washington post" OR "wapo" OR "wash post" OR washpost OR washingtonpost

13. (elizabeth AND dwoskin) OR elizabeth.dwoskin
14. “associated press” OR ap.org
15. “frank AND bajak” OR fbajak@ap.org
16. msnbc
17. nbc
18. cbs
19. fox
20. buzzfeed OR “buzz feed”
21. wired
22. “ars technical” OR arstechnica
23. Fortune
24. Verge
25. mashable
26. telegraph
27. “business insider” OR businessinsider
28. cadwalladr OR carole OR carole.cadwalladr@theguardian.com
29. (john AND mulholland) OR john.mulholland@theguardian.com OR  
john.mulholland@observer.co.uk
30. (david AND korzenik) OR dkorzenik@mkslex.com
31. bloomberg
32. techradar
33. koppelman
34. (robert AND burnson) OR burnson
35. (duncan AND campbell) OR duncancampbell.org
36. matt AND fowler
37. “buxtonthered” OR btrmisc
38. (olivia AND solon) OR olivia.solon@nbcuni.com
39. (cyrus AND farivar) OR cyrus.farivar@nbcuni.com

- 1 40. (suddeutsche AND zeitung)  
2 41. (open AND markets AND institute) OR openmarketsinstitutue.org  
3 42. (lina AND khan) OR khan@openmarketsinstitute.org  
4 43. “information commissioner’s office” OR ico.org.uk  
5 44. (alain AND kapper) OR alain.kapper@ico.org.uk  
6 45. “attorney general” OR (ag AND california) OR ag.ca.gov OR doj.ca.gov  
7 46. (stacey AND schesser) OR stacey.schesser@doj.ca.gov  
8 47. (lisa AND kim) OR lisa.kim@doj.ca.gov  
9 48. (ag AND massachusetts) OR massmail.state.ma.us OR state.ma.us  
10 49. (ag AND “new york”) OR ag.ny.gov OR (kathleen AND mcgee) OR (noah AND  
11 stein)  
12 50. “federal trade commission” OR ftc  
13 51. (maneesha AND mithal) OR mmithal@ftc.gov  
14 52. congress OR senat! OR “house of representatives”  
15 53. dcms OR (digital AND culture AND media AND sport)  
16 54. parliament  
17 55. collins OR damian.collins.mp@parliament.uk  
18 56. challenger OR challengerc@parliament.uk  
19 57. willows  
20 58. dehay OR “paulolivier” OR paulolivier@gmail.com  
21 59. (mark AND scott) OR mscott OR mscott@politico.eu  
22 60. politico  
23 61. (scott and galloway) OR sgallowa  
24 62. (bernie AND hogan) OR (bernard AND hogan)  
25 63. “facebook AND confidential”  
26 64. “protective order”  
27 65. dropbox AND “drop box”  
28 66. “godkin declaration” w/5 (anti AND slapp)

67. opposition w/5 (anti AND slapp)

All of the search terms listed below are intended to encompass all text strings that include these terms, including text strings that include text before and after the terms below. For example, “guardian” includes, without limitation, www.guardian.co.uk.

The search shall include all documents created, modified, or accessed between March 1, 2018 through the present.

Within 14 calendar days after the Court enters this Stipulation and Order, the Forensic Examiner shall upload all documents, with relevant metadata, that hit on these search terms from the Forensic Images of each of the Personal Devices and Accounts to a document review platform, such as Relativity. The relevant metadata includes, to the extent it exists and without limitation, custodian, file path, email subject, conversation index, from, to, cc, bcc, date sent, time sent, date received, time received, filename, author, date created, date modified, MD5 hash, file size, file extension, control number begin, control number end, attachment range, attachment begin, and attachment end (or the equivalent thereof). Counsel of record shall be given access to the document review platform within 14 calendar days after the Court enters this Stipulation and Order.

## **VI. OTHER PROVISIONS**

The Parties agree that the Forensic Examiner may serve as a fact or expert witness in this action to testify regarding the work it performed pursuant to this Stipulation. The Parties further agree that the Forensic Examiner will not serve in any other capacity with respect to the action (or any other litigation between the Parties) without the prior written consent of all Parties to this Stipulation.

Dated: July 12, 2019

DURIE TANGRI LLP

By: \_\_\_\_\_

SONAL N. MEHTA  
JOSHUA H. LERNER  
LAURA E. MILLER  
CATHERINE Y. KIM  
ZACHARY G. F. ABRAHAMSON

Attorneys for Defendants  
Facebook, Inc., Mark Zuckerberg, Christopher Cox,  
Javier Olivan, Samuel Lessin, Michael Vernal, and Ilya  
Sukhar



1 Dated: July 12, 2019

MACDONALD FERNANDEZ LLP

2  
3 By:

\_\_\_\_\_  
Reno F.R. Fernandez III  
Matthew J. Olson

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5 Attorneys for Plaintiff  
Six4Three, LLC  
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1 **PROOF OF SERVICE**

2 I am employed in San Francisco County, State of California, in the office of a member of the bar  
3 of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a  
4 party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

5 On July 12, 2019, I served the following documents in the manner described below:

6 **STIPULATION AND [PROPOSED] ORDER RE: NEUTRAL FORENSIC**  
7 **EXAMINER**

- 8 ☒ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Durie  
9 Tangri LLP for collection and processing of correspondence for mailing with the United  
10 States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to  
11 be placed in the United States Postal Service at San Francisco, California.
- 12 ☒ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through  
13 Durie Tangri's electronic mail system from CKim@durietangri.com to the email  
14 addresses set forth below.

15 On the following part(ies) in this action:

16 **VIA U.S. MAIL & EMAIL**

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18 Matthew J. Olson  
19 Macdonald Fernandez LLP  
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21 San Francisco, CA 94104  
22 Reno@MacFern.com  
23 Matt@MacFern.com

24 *Attorneys for Plaintiff Six4Three, LLC*

25 **VIA EMAIL ONLY**

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Scaramellino (individual capacities)*

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1  
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*Attorney for Birnbaum & Godkin, LLP*

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8 Joyce.Vialpando@wilsonelser.com  
9 Dea.Palumbo@wilsonelser.com

*Attorney for Gross & Klein LLP*

10  
11 I declare under penalty of perjury under the laws of the United States of America that the  
12 foregoing is true and correct. Executed on July 12, 2019, at San Francisco, California.  
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Catherine Y. Kim